Tri-State Generation and Transmission Association, Inc. *and* International Brotherhood of Electrical Workers, Local 111. Case 27–CA–16299–1

October 26, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On February 17, 2000, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order. We agree with the judge's finding that the Respondent did not violate Section 8(a)(5) of the Act by refusing to provide the information requested by the Union, but only for the following reasons.

The Respondent is a public utility engaged in the generation and distribution of electricity. Before 1992, the Respondent's service territory consisted of eastern Colorado and parts of Wyoming and Nebraska, and its operations and maintenance employees were not represented by a union. In that year, however, as a result of a bankruptcy proceeding involving Colorado-Ute, another Colorado utility, the Respondent acquired a number of Colorado-Ute's generating and transmission facilities servicing western Colorado. The operations and maintenance employees at the acquired facilities were represented by the Union at the time of the acquisition, and the Union negotiated a recognition agreement with the Respondent to continue to represent the employees who worked in the territory formerly serviced by Colorado-Ute.

In October 1998, the Respondent sent a letter to its employees, including those represented by the Union, announcing a possible consolidation with Plains Electric Generation and Transmission, Inc. (Plains), a utility company producing and distributing electricity in New Mexico. In March 1999, the two companies entered into a merger agreement which was contingent on approval by the New Mexico regulatory authorities.[1] On January 26, 1999, before the merger agreement was completed, the Union sent the Respondent a request for information concerning Plains' employees. The Union's letter stated:

> the [Plains operations and maintenance] employees who come under the supervision of Tri-State as the result of the merger will be properly included in the O&M bargaining unit. They will clearly have a community of interest with the bargaining unit employees. They will therefore be accreted into the bargaining unit without an NLRB election. Therefore, please provide us with the names and addresses of these employees.

The letter also requested that the Respondent provide Plains' personnel handbooks or policies, the "current and prospective compensation" of Plains' employees, their job classifications, and the corresponding job classifications in the Union's contract with the Respondent.

In its written response, the Respondent disputed the Union's claim of accretion and "for that reason" declined to comply with the request. On March 9, 1999, the Union filed a charge with the Board alleging a violation of Section 8(a)(5). On May 7, the Union sent a letter to the Respondent stating that apart from the accretion claim, the information requested in its January 26 letter was also relevant to "the preservation of the work of the bargaining unit," and that the Respondent was therefore required to provide the information "on that basis alone." The Respondent again refused to comply.

Although we agree with the judge that the Respondent's refusal to provide the requested information was not unlawful, we adopt this finding solely on the basis of the specific nature of the request for information, the Union's stated bases for the request, and the prevailing circumstances at the time the request was made.

There is no dispute that the information request pertained to matters outside the scope of the currently represented bargaining unit. It is well established that when a union seeks information concerning matters outside the bargaining unit, the union is required to make a showing of relevancy and necessity. E.g., *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998). Although that burden "is not an exceptionally heavy one," it does require a showing of "probability that the desired information is relevant and . . . would be of use to the union in carrying out its statutory duties and responsibilities." Id., quoting *NLRB v. Acme Industrial Co*., 385 U.S. 432, 437 (1967).

On January 26, when the Union sent its initial request, the prospective merger between the Respondent and Plains had not been consummated. In fact, the two employers had not even reached a binding merger agreement. It was therefore unclear when or to what extent the Respondent's and Plains' operations would be affected

[1] At the time of the hearing in this proceeding, the merger agreement had not received regulatory approval.

by the merger, should it materialize. Nevertheless, the Union's information request was predicated entirely on the assumption that the Plains employees would necessarily be accreted to the Union's bargaining unit whenever the merger occurred and that the Union would have the right to bargain on their behalf. The information requested, which pertained only to the Plains employees' identities and terms and conditions of employment, was not relevant unless those employees were in fact accreted. For example, although the Union pursued its information request after the merger agreement was announced in March, it did not at any time request any presumptively relevant information relating to the effects of that agreement on the terms of employment in the unit of the Respondent's employees which it then represented.

Without passing on the ultimate merits of the Union's prospective accretion claim, we agree with the judge that the information request was premature. While a union's request for information concerning a prospective merger may well be timely if the union can make the required showing of relevance, the Union failed to make such a showing for the information it requested here. Given what was known at the time the Union made its request, it could not reasonably be assumed that the Plains employees would be accreted with the bargaining unit in the event of the merger. Although it is true, as the Union emphasizes, that the Board has tended to favor systemwide bargaining units for public utilities, this general rule has not been applied without exception. E.g., *New England Telephone & Telegraph Co.*, 249 NLRB 1166 (1980); *Idaho Power Co.*, 179 NLRB 22 (1969). Further, in this case, the existing bargaining unit was already less than systemwide and limited to western Colorado, with employees in eastern Colorado and other states historically excluded. In addition, the accretion issue raised by the Union involved employees located outside Colorado.

Nor can we agree with the Union's alternative assertion, first raised after the charge was filed in this proceeding, that the requested information was relevant in the context of preserving the work of the Respondent's existing bargaining unit. The requested information concerned the Plains employees' premerger terms and conditions of employment and had no bearing on how the unit's work jurisdiction would be affected after the merger. Nor was there any indication that existing bargaining unit work would be transferred to Plains, or that plans for such transfer were in development.

For these reasons, we agree with the judge that the Union did not establish that the information it requested was relevant and necessary to its statutory duties and responsibilities. Accordingly, we find that the Respondent's refusal to comply with the request therefore did not violate Section 8(a)(5) and (1) of the Act.

ORDER

The complaint is dismissed.

Amadio E. Ruibal, Esq., for the General Counsel.
Steven J. Merker, Esq., of Denver, Colorado, for the Respondent.
Joseph M. Goldhammer, Esq., of Denver, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Denver, Colorado, on November 30, 1999, on the General Counsel's complaint which alleged that the Respondent refused to furnish certain information to the Charging Party in violation of Section 8(a)(5) of the National Labor Relations Act.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that the information requested related to its purchase of another company which has not yet taken place, that it does not in fact have much of the information requested and in any event, the requested information pertains to employees outside the collective-bargaining unit which the Charging Party represents.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent is a corporation engaged as a public utility in the generation, transmission, distribution, and sale of electricity. In the course of this business, the Respondent annually purchases and receives at its Colorado facilities goods, materials, and services valued in excess of $50,000 directly from points outside the State of Colorado. And the Respondent annually derives gross revenues in excess of $250,000. I therefore conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local 111 (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

For some years the Union was the bargaining representative of, and had collective-bargaining agreements covering, certain employees of Colorado-Ute Electric Association (Colorado-Ute), which generated and sold electricity in various parts of western and southern Colorado. Until the events described below, the Union had not represented any of the Respondent's employees.

In 1992, the Respondent acquired some, but not all, of Colorado-Ute's assets, as a result of Colorado-Ute's bankruptcy.

During the period leading to the Respondent's acquisition of two Colorado-Ute facilities, the Union negotiated with the Respondent concerning whether and to what extent the Respondent would recognize the Union and be bound by the collective-bargaining agreement between the Union and Colorado-Ute. Thus, on June 6, 1992, the Union and Respondent reached an agreement whereby the Respondent would recognize the Union as the bargaining representative of employees formally employed by Colorado-Ute at those facilities acquired by the Respondent. The recognition agreement contains the following clauses:

> 4. The union agrees that the collective bargaining agreements shall cover only those employees formerly employed by Colorado-Ute at those facilities, including transmission lines, formerly owned and operated by Colorado-Ute, except to the extent that the employer has transferred persons formerly employed by the employer to, or has hired new employees into, positions within the bargaining units at such facilities. Moreover, the union specifically agrees that said collective bargaining agreements shall not apply to or cover any facilities, including transmission lines, which were not formerly owned or operated by Colorado-Ute except to the extent that such coverage is established pursuant to and in accordance with the provisions of the National Labor Relations Act.
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> 5. The employer also agrees that any future facilities, including transmission lines, built and/or maintained which are within the former service territory of Colorado-Ute will be covered by any existing collective bargaining agreements. Moveover [sic], the union agrees that said collective bargaining agreements shall not apply to or cover any future facilities, including transmission lines, built or maintained by the employer which are not in the former service territory of Colorado-Ute except to the extent that such coverage is established pursuant to and in accordance with the provisions of the National Labor Relations Act.

Since 1992, the Respondent and the Union have been parties to collective-bargaining agreements covering the transmission and operations employees as well as clerical employees.

Sometime in 1998, the Respondent entered into negotiations to acquire Plains Electric Generation and Transmission, Inc. (Plains Electric), a company also engaged in the transmission and sale of electricity, but whose service area is entirely in the State of New Mexico. In March 1999 the Respondent and Plains Electric entered into a transaction agreement by which Plains Electric would be merged into the Respondent. To date, so far as I have been advised, approval of the New Mexico regulatory authorities is still pending and no final agreement has been reached concerning this acquisition.

On January 26, 1999, the Union requested the following information from the Respondent, on grounds that Plains Electric employees would be accreted into the Respondent's bargaining unit:

> 1. Any and all personnel handbooks or other materials which constitute the personnel policies under which the Plains operations and maintenance employees work.
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> 2. Information on the current and prospective compensation of the Plains operations and maintenance employees, including rates of pay, benefits and other emoluments of employment.
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> 3. Titles of the job classifications of all Plains employees who do work comparable to the work performed by the employees in the O&M bargaining unit at Tri-State, and the job classification in the Tri-State Agreement to which the Plains classification corresponds.
>
> 4. The names and addresses of the Plains operations and maintenance employees.

The Respondent has declined to furnish the requested information on grounds that such of the information as it has (which is by no means all of it) pertains to employees outside the bargaining units represented by the Union.

B. Analysis and Concluding Findings

There is no dispute that a union is entitled on request to information relating to the bargaining unit employees whom it represents and that such information is presumptively relevant. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). There is also no dispute that the presumption of relevancy does not reach information relating to nonunit employees. Where a union seeks information on matters outside the bargaining unit, it must prove relevancy and necessity. E.g., *Uniontown County Market,* 326 NLRB 1069 (1998).

Before the Respondent and Plains Electric had even entered into the preliminary transaction agreement, the Union requested of the Respondent information relating to the Plains Electric employees. Although some of the requested information would no doubt have been given to the Respondent by Plains Electric during the course of their negotiations, it is not obvious that the Respondent would have much of the information the Union demanded.

According to representations of counsel for the Respondent, it has some of the information requested but Plains has refused to give it payroll information.

In any event, it seems clear that the Union's demand was premature. Whatever obligation the Respondent might have to furnish the Union information relating to the Plains Electric operation would not arise until the Respondent took over Plains Electric. At the time of the Union's request, continuing to the date of the hearing, and to the present, the Respondent and Plains Electric have been distinct companies. The Respondent has had no control over the operations of Plains Electric or authority over its employees. The obligations of the Respondent, if any, as to matters involving the Plains Electric employees will be determined by future events.

Beyond this, I conclude that the General Counsel's argument of relevance is without merit. The General Counsel contends that the Union reasonably believed that the Plains Electric employees would be accreted into the Respondent's bargaining unit because the Board has long held that the optimum unit in the public utility industry is systemwide. *Baltimore Gas & Electric,* 206 NLRB 199 (1973). Therefore, on finalization of the acquisition agreement, Plains Electric employees will become part of the bargaining units represented by the Union.

I disagree. The Board's policy of systemwide units is based on the integrated nature of public utility operations. However, less than systemwide units have been found appropriate. See, e.g., *Natural Gas Pipeline Co*., 223 NLRB 1439 (1976) (employer's operation was divided into two separate systems); *Arizona Public Service* Co., 310 NLRB 477 (1993) (residual unit of one plant found appropriate).

There is no evidence that on acquiring the Plains Electric assents, those operations would in any way be integrated with those of the Respondent. To the contrary, the total service area of Plains Electric is in New Mexico, whereas the Respondent operates in Colorado and Wyoming, with the Union representing only certain Colorado employees. And the bargaining history is for less than a systemwide unit. Indeed, the Union specifically agreed that only those employees at facilities formerly operated by Colorado-Ute which the Respondent acquired would comprise the bargaining unit. The recognition clause in the current collective-bargaining agreement (March 30, 1997, through April 2, 2000), and its predecessors, covers operations and maintenance employees "in the service territory covered by this agreement on April 14, 1992." None of the Respondent's other employees at other facilities in Colorado are represented by the Union or included in the bargaining unit.

On the limited facts of this record, it cannot be concluded that the Board would probably find an accretion of Plains Electric employees to a unit of the Respondent's employees. It is possible, of course, that should the Respondent ultimately acquire Plains Electric and should the Union file an appropriate petition, the Board would find an accretion.

But such is unlikely, given the Union's specific agreement that recognition would be limited to those of the Respondent's employees at facilities in the former Colorado-Ute service area, and its continued agreement that the collective-bargaining contract covers only those employees. *Mohenis Services,* 308 NLRB 326 (1992) (where the Board found that similar language amounted to a waiver of possible accretion of a new plant to the existing bargaining unit).

The Respondent argues that denying recognition at future facilities "except to the extent that such coverage is established pursuant to and in accordance with the provisions of the National Labor Relations Act," means Board-conducted representation elections. And the Respondent's negotiator testified that such was the intent of parties.

The General Counsel and Union argue the language includes the Board's Rules governing unit accretions. And the Union's negotiator testified that such was his understanding of this language—that it included unit clarification petitions. However, this testimony is not particularly convincing since he did not know what and RC petition is.

Nevertheless, even if this language is subject to different interpretations, I conclude that the bargaining history, as memorialized in successive collective-bargaining agreements, specifically restricts the bargaining unit to employees in the former Colorado-Ute service area. I conclude that on the facts here accretion is not sufficiently likely to sustain the Union's burden of showing relevance of the requested information.

In reaching this conclusion I reject the General Counsel's reliance on *Torrington Co.*, 223 NLRB 1233 (1976), where the Board found that information about a new plant was relevant because it might reasonably have been accreted into the covered unit.

In that case the parties had provided for coverage of after-acquired plants within a 75-mile radius. Here the parties specifically limited recognition to employees in the service area covered by the 1992 agreement.

In the alternative, the General Counsel argues that the Union was entitled to the requested information in order to analyze the impact on unit employees by the proposed merger. While right to information is a liberal, discovery-type standard, the mere assertion that the information might be of some use to the union in its representative capacity, and similar boilerplate, is not sufficient to establish relevancy. E.g., *Super Valu Stores,* 279 NLRB 22 (1986). A specific need must be shown. The General Counsel argues this was established by the Union in claiming the information was necessary to preserve bargaining unit work. I find this contention too tenuous to support the Union's request. Plains Electric not only operates in a substantially different service area from the Respondent, it operates in a different state, subject to different regulatory authorities. There is simply no evidence to support the contention that on merger, former Plains Electric employees might do bargaining unit work.

Accordingly, I conclude that the General Counsel did not prove the information requested by the Union was relevant and necessary or the Respondent's refusal to furnish the information was violative of Section 8(a)(5) of the Act.

On these findings of fact, conclusions of law, and the entire record, I issue the following recommended[1]

ORDER

The complaint is dismissed in its entirety.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.